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No. 88-1597

In the Supreme Court of the United States

OCTOBER TERM, 1988

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), ET AL., PETITIONERS

v.

BRIDGET C. MERGENS, BY AND THROUGH HER NEXT FRIEND, DR. DANIEL N. MERGENS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that petitioners had allowed one or more "noncurriculum related" student groups to meet on school premises during noninstructional time, thereby triggering the application of the Equal Access Act, 20 U.S.C. 4071 *et seq.* (Supp. V 1987).

2. Whether the Equal Access Act, which makes it unlawful for any public secondary school subject to the Act to deny equal access to students who wish to form an organization at the school to engage in religious speech, violates the Establishment Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 867 F.2d 1076. The opinion of the district court (Pet. App. B1-B30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1989. The petition for a writ of certiorari was filed on March 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Equal Access Act (EAA), 20 U.S.C. 4071 *et seq.* (Supp. V 1987), makes it unlawful for any public secondary school that receives federal financial assistance and that has a "limited open forum" to "discriminate[] against any students who wish to conduct a meeting within that limited open forum on the basis of religious, political, philosophical, or other content of the speech at such meetings" (20 U.S.C. 4071(a) (Supp. V 1987)). The Act provides that a "limited open forum" exists whenever a public secondary school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time" (20 U.S.C. 4071(b) (Supp. V 1987)). The Act defines "meeting" to include "those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum" (20 U.S.C. 4072(3) (Supp. V 1987)). Finally, the Act provides that it should not be construed to authorize any governmental unit "to sanction meetings that are otherwise unlawful," "to abridge the constitutional rights of any person," or "to limit the authority of the school * * * to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary" (20 U.S.C. 4071(d)(5) and (7), 4071(f) (Supp. V 1987)).

2. Respondents include former and present students at Westside High School (WHS) in Omaha, Nebraska, who sought the permission of petitioners, the Board of Education and various Westside school officials, to form a Christian Bible Study Club at WHS (Pet. App. A3-A8). WHS receives federal funds (*id.* at A4). At WHS, approximately 30 student clubs and organizations meet after school hours on school property (*id.* at A4-A5). According to formal School Board policy, student clubs are "a vital part of the total educational program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills" (*id.* at B19). The policy further provides that "School-sponsored" organizations are "directly under the control of the school administration, and shall have faculty sponsorship" (*ibid.*). The policy excludes organizations sponsored by "any political or religious organization" or by "any organization which denies membership on the basis of race, color, creed, sex or political belief" (*ibid.*).

School district officials rejected the student respondents' proposal on the ground that allowing the Christian Bible Study Club in a public school would violate the Establishment Clause (Pet. App. A6). The School Board upheld the denial (*id.* at B4). According to the Board, the proposed club would violate Board policy, which limited use of school buildings to school-sponsored, curriculum-related activities (*id.* at A7).

3. The student respondents filed this lawsuit in the United States District Court for the District of Nebraska, in which they alleged that the action of the School Board and school district officials violated the students' rights under the First Amendment, the Equal Access Act, and the Nebraska Constitution (Pet. App. A7-A8). Petitioners argued in response that neither the First Amendment, the Equal Access Act, nor the Nebraska Constitution required the high school to sponsor the Christian Bible Study Club and to allow it to meet at the school. They also defended on the ground that the Establishment Clause prohibited such sponsorship and school meetings.

Pursuant to 28 U.S.C. 2403(a), the United States intervened for the purpose of defending the constitutionality of the Equal Access Act.[1]

At trial, the school principal and the superintendent for the school district testified that each of the existing school clubs was curriculum related. See Pet. App. B21-B22.[2] The school principal also testified that "WHS administrators are extremely concerned with exposing students to all sides of controversial issues" and that "permitting a sanctioned Christian group would stand in conflict with this policy" (*id.* at B24).

Following trial, the district court dismissed the student respondents' complaint (Pet. App. B1-B30). The court concluded that "WHS has not created a limited open forum as that term is used in the [Equal Access Act] or in the Supreme Court's analysis in *Widmar* [v. *Vincent*, 454 U.S. 263 (1981)] and *Hazelwood* [*School Dist.* v. *Kuhlmeier*, 108 S. Ct. 562 (1988)]" (Pet. App. B25). The court found that "WHS has only sparingly permitted, outside of the classroom setting, the use of school facilities for political, social or economic discussions" and that "those clubs which are currently permitted to utilize the facilities at WHS are curriculum related and tied to the educational function of the institution" (*id.* at B25-B26). Because the court agreed with petitioners that

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[1] The United States did not address in the lower courts the threshold question whether the EAA's equal access requirement applied to WHS.

[2] The student respondents contended that ten clubs were not curriculum-related. Among these ten were the chess club, Subsurfers (a scuba diving club), the photography club, and Interact and Zonta (two service clubs). See Pet. App. B20-B22.

the Equal Access Act's equal access requirement therefore did not apply, the court did not address petitioners' further contention that the Establishment Clause mandated petitioners' denial of school access to the students' proposed club (*id.* at B26 n.5).

The district court also rejected the student respondents' contention that the First Amendment's Free Speech and Free Exercise Clauses supported equal access to the proposed Christian Bible Study Club (Pet. App. B26-B29). The court concluded that petitioners' "goal of presenting a balanced view when political, religious and economic information is dispensed within WHS facilities" is "a legitimate educational concern which reasonably justifies WHS's actions in this case" (*id.* at B28).

Finally, referring to the trial testimony of one of the student respondents and of the school principal, the district court stated that petitioners "are free to exercise their religious beliefs and engage in informal religious discussions at school" (Pet. App. B28-B29). According to the court, moreover, "[a]ny attempt by WHS to prohibit such informal meetings or exchanges between students, before or after instructional time, and even using school rooms or cafeteria tables, subject, of course, to reasonable time, place and manner restrictions would meet strong constitutional objection" (*id.* at B29). The court indicated that it was "hold[ing] simply that WHS need not permit its facilities to be used by a school sanctioned Christian club" (*ibid.*).

4. The court of appeals reversed (Pet. App. A1-A21). Singling out the chess club, the court found that the existing school clubs were not all curriculum-related and that the district court's contrary view rested on a "broad interpretation of 'curriculum-related' [that] would

make the EAA meaningless" (*id.* at A12; see *id.* at A14). Under the district court's view, the court of appeals explained, a high school could avoid the federal statute's equal access requirement by "simply declar[ing] that it maintains a closed forum and choos[ing] which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal" (*ibid.*).

The court rejected petitioners' contention that the EAA violates the Establishment Clause (Pet. App. A14-A20): Agreeing with respondents and the United States, the court reasoned that "the EAA codifies the Supreme Court's decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), * * * extending that holding to secondary public schools" (*id.* at A15) and "[a]ny constitutional attack on the EAA must therefore be predicated on the difference between secondary school students and university students" (*id.* at A19). The court concluded, however, that *Widmar* could not be validly distinguished on that ground because "Congress considered the difference in the maturity level of secondary students and university students before passing the EAA" (*id.* at A19-A20). The court added that even in the absence of the EAA it would reach the same result "under *Widmar* alone" because "the facts in the case before us are the same as the facts in *Widmar* except for the setting" (*id.* at A20).

ARGUMENT

This case presents important questions concerning both the meaning and the constitutionality of the Equal Access Act. In our view, the court of appeals ruled correctly that the EAA, where it applies, is constitutional. Although that decision does not squarely conflict with the

decision of any other court of appeals, the reasoning of the lower court is in substantial tension with that of a recent decision of a panel of the Ninth Circuit in *Garnett* v. *Renton School Dist.*, 865 F.2d 1121 (1989), amended, March 3, 1989, and May 15, 1989. Given the importance of the questions presented and the divergent perspectives on the Act already reflected in the courts of appeals, further review by this Court may be warranted. On balance, however, we believe that the issues presented by the enactment of the EAA could profit from further development by the lower courts. In the absence of a square circuit conflict, and especially in light of the fact that a petition for rehearing and suggestion for rehearing en banc are still pending in *Garnett*, we therefore believe that further review by this Court in this case would be premature.

1. In *Bender* v. *Williamsport Area School Dist.*, 469 U.S. 1206 (1985), this Court granted certiorari to consider a dispute similar to the one at issue in this case. In *Bender*, the controversy was framed entirely in constitutional terms, namely, whether the Free Speech Clause requires or, conversely, the Establishment Clause forbids a public secondary school to allow religious student organizations to meet at the school. The Court did not reach the merits in *Bender*, however, because the respondent in that case had no standing to take an appeal to the court of appeals and therefore the court of appeals lacked jurisdiction to hear that appeal. See 475 U.S. 534 (1986).[3] This case raises similar constitutional questions

[3] A similar jurisdictional defect is not present here. In *Bender*, the only party to file a notice of appeal (a member of the School Board) "ha[d] no personal stake in the outcome of the litigation

but in a different context because the students in this case, unlike those in *Bender*, base their claim on the Equal Access Act (which was passed after the court of appeals decision in *Bender*) in addition to the Free Speech Clause.

The injection of EAA claims into litigation over the rights of religious student organizations to meet at public secondary schools is significant for several reasons. First, it raises difficult issues of statutory construction not presented in *Bender*. Congress chose not to define in the EAA the equal access requirement's statutory trigger ("noncurriculum related student groups"). The resulting ambiguity about the scope of the Act's application presents questions both about the proper interpretation of the Act's language and about the degree of deference owing to the determinations of local school officials. Those questions would benefit from being allowed "to mature through full consideration by the courts of appeals"

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and therefore did not have standing to file the notice of appeal" (475 U.S. at 543-544). In this case, the student plaintiffs who filed a notice of appeal did have the requisite "personal stake in the outcome of the litigation." Moreover, the possibility of the student plaintiffs' graduating from WHS does not appear to present immediate standing problems. Because all but one of the original student plaintiffs had graduated by the time of the appeal to the Eighth Circuit, plaintiffs' counsel filed a motion to add additional student plaintiffs who will not graduate for several years (see Pet. 17 n.4). That motion, which was pending at the time of the writing of the petition in this case (see *ibid.*), was granted by the court of appeals on March 28, 1989.

(*E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977)).[4]

Second, the questions of statutory construction presented by the Equal Access Act and the question of the Act's constitutionality are interrelated. The Act's constitutionality depends on the fact that its equal access requirement is triggered only where a "limited open forum" exists at secondary schools subject to the Act. Hence, resolution of the Act's constitutionality would itself benefit from the court of appeals' "full consideration" of the threshold issues of statutory construction.

Third, the EAA is significant because it reflects Congress's judgment that a distinction between university students and secondary students is not warranted for Establishment Clause purposes in this setting – a question impliedly left open by this Court in *Widmar* v. *Vincent*, 454 U.S. 263, 274 n.14 (1981). The courts of appeals that had previously held that the Establishment Clause bars student religious organizations from meeting at public secondary schools have generally not had an opportunity to revisit that issue in light of this congres-

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[4] The only guidance in the statutory language on the meaning of "noncurriculum related" is in the EAA's definition of "meeting" in terms of activities of student groups "not directly related to the school curriculum" (20 U.S.C. 4072(3) (Supp. V 1987)).

sional judgment.[5] The possible impact of the EAA on those courts is thus not yet known.

2. To date, only two federal courts of appeals have decided claims brought in part under the EAA: the Eighth Circuit in this case and the Ninth Circuit in *Garnett* v. *Renton School Dist.*, 865 F.2d 1121 (1989), amended, March 3, 1989, and May 15, 1989, petition for rehearing and suggestion for rehearing en banc pending. Although those cases involved similar facts, the courts of appeals reached different results and utilized inconsistent reasoning.

In this case, the Eighth Circuit held that the secondary school (WHS) had to provide access to a Christian Bible Study Club equal to that which the school was then providing to other clubs, including the chess club, that the court held were "noncurriculum related" (Pet. App. A11-A14). Indeed, the court concluded that the district court's contrary interpretation of "noncurriculum related" "would make the EAA meaningless" (Pet. App. A12). In *Garnett*, however, the Ninth Circuit held that the EAA's equal access requirement did not apply because the existing school clubs, including the chess club, "are so closely related to course work or are so integral a part of the traditional and official school programs that they

[5] See, *e.g.*, *Bell* v. *Little Axe Ind. School Dist.*, 766 F.2d 1391 (10th Cir. 1985); *Bender* v. *Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), rev'd on other grounds, 475 U.S. 534 (1986); *Nartowicz* v. *Clayton County School Dist.*, 736 F.2d 646 (11th Cir. 1984); *Lubbock Civil Liberties Union* v. *Lubbock Ind. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983); *Brandon* v. *Board of Education*, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981).

cannot reasonably be termed 'noncurriculum related'" (slip op. 5187 (as amended May 15, 1989)).[6]

Moreover, although the Ninth Circuit in *Garnett* held that the EAA was inapplicable, and thus did not have occasion to determine whether it is constitutional, the court nevertheless ruled (slip op. 5179) outside the context of the Act that "[a]llowing the requested meeting of this particular student religious group in a public high school classroom at a time closely associated with the school day" (before the school day) would violate the Establishment Clause. The court's reasoning in reaching that conclusion is inconsistent with the Eighth Circuit's reasoning in this case. The Ninth Circuit relied in part on its perception that the classrooms in the high school at issue in *Garnett*, "unlike the facilities considered in *Widmar*, are not a public forum for student expression" (slip op. 5185). But the court more directly grounded its Establishment Clause ruling on its view that *Widmar* was distinguishable: "The same considerations that mandate special vigilance in preventing religious establishments in public schools – the impressionability of young students, compulsory attendance laws that make students a captive audience, and the role of public schools in inculcating democratic ideals – distinguish public secondary schools from public universities" (slip op. 5182). In coming to the opposite conclusion in this case – that is, in ruling that no valid distinction can be drawn between the uni-

[6] In both this case and *Garnett*, all existing clubs had faculty sponsors (see Pet. App. B20-B23; *Garnett*, slip op. 5187). And in both cases, high school officials testified that the existing clubs were all curriculum related (*ibid.*). In *Garnett*, the district court made the further finding that none of the existing clubs was "student initiated or student directed" (slip op. 5187).

versity and secondary school settings in this context – the Eighth Circuit expressly acknowledged, but declined to embrace, the Ninth Circuit's different view (see Pet. App. A19-A20 & n.3).[7]

3. There is, however, no direct conflict between the decisions of the two courts of appeals. The Eighth Circuit has held in this case that the EAA applies to one high school, and that it is constitutional as applied; the Ninth Circuit has held in *Garnett* that the EAA does not apply to another high school and thus did not expressly reach the question of the Act's constitutionality. Although the general curriculum at the two schools appears to be similar, and the types of student organizations overlap, the disagreement between the courts of appeals over the application of the Act cannot be directly attributed to any specific disagreement over the meaning of the Act's terms, as opposed to a disagreement over how those terms should be applied in specific circumstances. And although the Ninth Circuit appears to be willing to afford more deference to the determination of local school officials of what is curriculum related, in the end both courts recognized that deference can extend only so far and that a court cannot abdicate its responsibility to determine the meaning of "noncurriculum related" for EAA purposes (Pet. App. A12-A13; *Garnett*, slip op. 5187).

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[7] The Ninth Circuit's apparent concern with allowing a student religious club to meet in a public high school "just before the start of classes" would not be allayed by the EAA's defining of "noninstructional time." Such time is defined as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends" (20 U.S.C. 4072(4) (Supp. V 1987)).

In addition, the ultimate extent of the conflict between the two circuits is uncertain because the Ninth Circuit's ruling is still subject to revision. The Ninth Circuit has twice amended its opinion since it was first issued last January, and a petition for rehearing and suggestion for rehearing en banc remain pending before that court. Until the Ninth Circuit has disposed of that petition, further review by this Court of the apparent inconsistencies between the Eighth Circuit's ruling here and the Ninth Circuit's in *Garnett* would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.[8]

Respectfully submitted.

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[8] Alternatively, the Court could hold the petition in this case pending the Ninth Circuit's disposition of the petition for rehearing and suggestion for rehearing en banc in *Garnett*.

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